No. 3055.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The New York Central Railroad Company, a Corporation,
Plaintiff in Error,
vs.
Mutual Orange Distributors, a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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According to the complaint in this action, about January 23, 1913, the defendant, pursuant to a written contract (which is the bill of lading attached to the complaint) shipped over the lines of the Santa Fe Railway Company from Cucamonga a carload of oranges with Kansas City as the original point of destination, and with James A. Coogan as consignee. Sometime after shipment, defendant reconsigned said shipment to Wichita, Kansas, where upon arrival of

the goods a tender of delivery was made to defendant, but thereafter defendant reconsigned said shipment, on or about February 5, 1913, to Des Moines, Iowa, and again a tender of delivery was made.

On February 15, 1913. defendant again reconsigned the shipment to Clinton, Iowa, and thereafter from time to time other reconsignments were made at different points along the lines of the Santa Fe and connecting carriers, until finally, upon their arrival at Buffalo, New York, the car was taken by the plaintiff as a connecting carrier, which company in pursuance of reconsignments by defendant, transported the car, first to Albany, New York, and thence to New York City, where, upon inspection, it was discovered that the oranges were unfit for human consumption, and the entire carload was by the health department of the city ordered destroyed. [Record pp. 6-9.]

Under the terms of the contract and in accordance with the tariffs and classifications applicable thereto, and in force and effect and on file with the Interstate Commerce Commission, the freight, refrigeration, car service charges and other lawful expenses of transportation, became due on the shipment amounting to the sum of $401.27—"which said total sum, under the Constitution and laws of the United States, the plaintiff was and is bound to collect, and which said amount is justly due the plaintiff from the defendant," but defendant has refused to pay the same.

"That under and in pursuance with the terms and provisions of an act of Congress made February 4, 1887, entitled 'An Act to Regulate Commerce,' and

acts amendatory thereof and supplemental thereto, there is now due, owing and unpaid by defendant to plaintiff said sum of $401.27." [Record pp. 9-10.]

The bill of lading was issued by the Atchison, Topeka & Santa Fe Railway Company, and recites the receipt of the goods from the defendant, "subject to the classifications and tariffs in effect on the date of the issue of this original bill of lading," consigned to James A. Coogan, destined to Kansas City, and "which said company agrees to carry to its usual place of delivery at said destination if on its road, otherwise to deliver to another carrier on the route to said destination."

By the terms of the bill of lading it was agreed that every service to be performed thereunder should be subject to the conditions printed in the bill of lading, among others the following:

"In issuing this bill of lading this company agrees to transport only over its own line and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line." [Record p. 15.]

"*Section* 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery." [Record p. 18.]

A demurrer to the complaint was interposed specifying insufficiency of facts to state a cause of action; lack of jurisdiction; certain grounds of uncertainty; and the statute of limitations. [Record p. 22.]

Plaintiff was given an opportunity to amend the complaint, but declined to do so. [Record p. 28.]

And accordingly the demurrer was sustained without leave to amend. [Record p. 24.]

I.

The United States District Court Is Without Jurisdiction of the Case Stated in the Complaint, and the Demurrer Was Properly Sustained on That Ground.

The diversity of citizenship between the parties to the suit did not confer jurisdiction because the amount involved was less than three thousand dollars. (Judicial Code, Sec. 24, Par. 1.)

Unless, therefore, a federal question is involved, the action was properly dismissed for want of jurisdiction. We contend that no federal question is involved.

Subdivision 8 of section 24 of the Judicial Code provides that the District Court shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the commerce court."

Does this suit arise under any law regulating commerce? To answer this question we must first determine what is meant by the words "arising under any law." This same phraseology was used in the judiciary act originally adopted, and has been the subject of frequent discussion ever since the federal courts were created. And while there has been a wide diversity of irreconcilable statements on the subject, neverthe-

less we think we are safe in saying that according to the great preponderance of authority something more is required than a mere reference to some federal law which might be remotely involved. On the contrary, it must appear either that the suit depends upon and is referrable to some federal statute, treaty or constitutional provision except for which the remedy does not exist, or else there must be a substantial dispute as to the construction of some provision of the federal law. If in fact the determination of the case depends upon the decision of questions of local or general law, it cannot be brought within the jurisdiction of the federal court as one arising under the laws of the United States merely by a reference in the complaint or declaration to some federal statute.

See the exhaustive compilation of decisions on this subject in the annotations of the original act defining the jurisdiction of the Circuit Court.

4 Fed. Stats. Ann., p. 265, and especially pp. 281-288.

And also for a most concise and clear resume of the conflicting definitions of the meanings of the terms as applied to a case wherein it was claimed that a suit growing out of the Interstate Commerce Act gave rise to a federal question, see:

McGoon v. Northern Pacific Etc. Distr. Court, North Dakota, 204 Fed. 998,

wherein Judge Amidon quotes the following from the case of Defiance Water Company v. Defiance, 191 U. S. 184, 48 L. Ed. 140:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in a legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

48 L. Ed. 1001.

In that case the conclusion was reached that the case did arise under the interstate commerce law, because it was an attempt to hold a carrier responsible for damages to livestock under such circumstances as that it could not have been responsible except for the provisions of that act. In other words, a liability was directly created by the act, and except for the statute plaintiff would not have had a right of recovery at all. While the facts are not very clearly set forth in the decision, nevertheless it is stated that:

"Defendant's liability arises wholly out of section 20 of the Interstate Commerce Act * * * which section abrogates all state and common-law liabilities on interstate shipments of property. If the statute does not give plaintiff a right of recovery, he has none."

48 L. Ed. 999.

The section referred to, after elaborate provisions as to detailed reports by carriers as to statistics of earnings, etc., requires that every common carrier receiving property for transportation from one state to another, must issue a bill of lading, "and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such carrier from the liability hereby imposed."

Fed. Stats. Ann. Sup. of 1909, page 273.

Now before this statute was enacted, where the injury to the property occurred on the lines of a connecting carrier, the shipper could only recover from that carrier, but under this provision the initial carrier who issues the bill of lading is liable under all circumstances. Therefore a suit against the initial carrier where the loss occurred on the lines of another carrier is dependent entirely upon the federal statute, and hence may be said to arise under a law regulating commerce.

But in our case the obligation to pay freight is not dependent upon the interstate commerce law, nor in any way referable to it. It exists either by virtue of the written contract to pay the freight, or else is implied by law, and a recovery may be had either against the owner, the consignor or the consignee, on the strength

of this implied or express promise to pay, quite independently of the Interstate Commerce Act.

Chicago Etc. R. Co. v. Floyd (Texas), 161 S. W. 954;

Cincinnati Etc. R. Co. v. Vredenburgh Sawmill Co. (Ala.), 69 So. 228, especially 230;

Cornelius Co. v. Central Etc. R. Co. (Ala.), 69 So. 331,

wherein many cases are cited.

New York Etc. R. Co. v. York & Whitney Co. (Mass.), 102 N. E. 366.

Moreover, it must be borne in mind that in our case there is no claim that any dispute exists as to the *amount* of the freight. On the contrary, the bill of lading expressly recites that the goods are received "subject to the classification and tariffs in effect on the date of issue of this original bill of lading." Therefore the amount of the freight is fixed by contract in exact accordance with the allegations of the complaint, and hence in no conceivable sense is either the suit dependent upon the interstate commerce law or any other federal statute, nor is the liability created by any such statute, nor will the decision of the case involve the interpretation of any law of the United States; but, on the contrary, the liability is purely a contractual one, either express or implied, and insofar as this defendant is concerned, our contention is that it is an implied one, because there is no express promise in the bill of lading on the part of the consignor to pay the freight, as we shall contend in connection with the defense of the statute of limitations.

Measured by the test of federal jurisdiction set forth by Judge Amidon in the McGoon case, we submit that our case does not arise under any federal law. He states the rule thus:

"The line of distinction which it seems to me will go far to harmonize the cases is this: When the complaint shows a case which arises out of a contract or a common-law right of property, and only indirectly and remotely depends on federal law, such a case not only does not, but cannot, properly turn upon a construction of such law. But when the complaint asserts a right *created* by federal law, it presents a suit which may properly turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction notwithstanding the defendant may raise only issues of fact by his answer."

204 Fed. 1005.

The distinction which we have pointed out between our case and the McGoon case will serve also as the basis of distinction between the case at bar and the following other cases cited by plaintiff in error, to-wit:

Smith v. Santa Fe Ry. Co., 210 Fed. 988;

Santa Fe v. Kinkade, Judge Pollock, 203 Fed. 165;

Illinois Central v. Segari, Judge Foster of La., 205 Fed. 998;

Alabama Great Southern v. American Cotton Oil Co. (C. C. A. 5th Cir.), 229 Fed. 11;

New York Etc. R. Co. v. Beham, 242 U. S. 148, 61 L. Ed. 210;

Pennsylvania R. Co. v. Olivit Bros., 243 U. S. 574, 61 L. Ed. 908;
Darnell v. Ill. Cent. R. Co., 190 Fed. 656;
Lyne v. Delaware Etc. R. Co., 170 Fed. 847.

Those cases were either cases for freight wherein the shipper and railroad company had contracted for a rate which conflicted with the tariffs established by the Interstate Commerce Commission, and the decision of the case necessarily involved the determination of the question of whether the tariff rates controlled the contract rates or not, or else the cases involved an attempt to collect damages from the initial carrier where the loss occurred on connecting lines, which remedy is created by the statute, and unqualifiedly dependent upon it. Besides, we have the authority of the C. C. A., 5th Circuit, in a case identical with ours, declaring that no jurisdiction exists.

Yazoo Etc. Co. v. Zemurray, 238 Fed. 789, wherein the court said:

"On the facts stated we doubt the jurisdiction of the court on the ground that the amount involved is less than $3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier, through error and neglect, failed to collect the stipulated freight from the consignee and now sues the consignor.

"We find no evidence in this case involving the Elkins law, or any other interstate commerce law."

Id. 791.

See also,

Taylor v. Anderson, 234 U. S. 74,

wherein the rule is stated as follows:

"It is now contended that these allegations show that the case was one arising under the laws of the United States—namely, the acts restricting the alienation of Indian allotments—and therefore brought it within the court's jurisdiction. But the contention overlooks the repeated decisions in this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute (now §24, Judicial Code) must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill of declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." (Citing numerous cases.)

234 U. S. 75.

Also, in the case of

St. Louis Southwestern Ry. Co. v. Gramling (Ark.), 133 S. W. 1129,

there was involved an attempt made by a railway company to recover unpaid freight growing out of a failure to quote the proper rates. It was contended by defendant's counsel that the state court had no jurisdiction to entertain the case because the matter involved related to an interstate shipment, and that any right which plaintiff might have was cognizable only before the Interstate Commerce Commission or a United States court.

"It is urged that the freight or compensation for which plaintiff seeks recovery in this case is a subject of interstate commerce and governed by the Interstate Commerce Act of Congress, approved February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and the act of Congress amendatory thereof (Act of June 11, 1906, c. 3073, 34 Stat. 232,—U. S. Comp. St. Supp. 1909, p. 1148—),and that on this account a recovery of such freight cannot be enforced in a state court. *But we do not think that the cause of action set out in the complaint grows out of any right created by or springing from said acts of Congress. The cause of action herein set out is simply for the recovery of an indebtedness due for a service performed. The indebtedness grows out of a contract, which is only an incident of an interstate shipment, and is not a liability springing from or created by any act of Congress.* It is simply alleged that the defendant owed to plaintiff a certain sum for the transportation of his goods; that in making payment of the freight a mistake was made, so that the defendant did not pay the entire amount of the charges; and that therefore he owes the balance. *It is, in effect, a suit to recover a balance claimed to be due upon an account."*

133 S. W. 1131.

The distinction between the cases cited by appellant wherein federal jurisdiction was upheld in suits against the initial carrier for damages resulting to goods on the lines of connecting carriers, and which we have hereinbefore referred to, is clearly pointed out by

Judge Reed of the Northern District of Iowa in the case of

Storm Lake Tub Factory v. Minneapolis Etc. R. Co., 209 Fed. 895.

He points out that at the common law and quite independently of any federal legislation, a shipper is liable for damages for injuries to or loss of goods occurring on its own lines except where the loss resulted from the act of God, but at the common law an initial carrier under such a state of facts would not be liable for loss through the fault of a connecting carrier to whom it had in due course safely delivered the goods for further transportation unless such a liability was undertaken by express contract. However, under the Carmack Amendment, the liability is extended in favor of the shipper against the initial carrier for any loss, damages or injury caused by it or by any common carrier to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such carrier from the liability thereby imposed.

This legislation was upheld by the Supreme Court of the United States, as Judge Reed points out in the case of

Atlantic Etc. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Supr. Ct. Rep. 164, and reported also 31 L. R. A. (N. S.), page 7.

where, in an exhaustive note, the liability of carriers from loss beyond their own lines is considered.

In the language of Judge Reed: This act creates a right of action against such carriers that did not previously exist insofar as suits or actions for damages against the initial carrier for loss which has occurred upon the lines of connecting carriers is concerned, but that insofar as suits against the initial carrier are concerned for injury to or loss of property occurring on its own line, they do not arise under the act to regulate commerce, but are actions to recover from such carrier upon its common law liability.

And he further says:

"The Carmack Amendment does not create its liability for such a loss, for such liability arises under the common law which holds a common carrier of property liable for its loss or injury while in its custody as such carrier from all causes not due to an act of God or the public enemy."

Id. 903.

The same reason, we submit, and a like distinction may be applied to the freight cases relied upon in the brief of plaintiff in error with possibly one exception.

In the Kinkade case, 203 Federal 165, cited on page 16 of appellant's brief, the amount of freight paid and presumably the amount contracted to be paid, although the statement of facts is not very clear on the point, was $267.37, whereas the regularly established tariff on file with the Interstate Commerce Commission amounted to $411.08, and the suit was to recover the difference. Obviously, except for the Interstate Commerce Act, there would have been no right of action

for this difference; on the contrary. the contract rate would have controlled, so that the suit was necessarily based upon the federal statute. But it will be remembered that in our case the contract fixed the freight rates in accordance with the classifications and tariffs in effect on the date of issuance of the bill of lading, so that the right of action on the contract was complete and unqualified and quite independent of the statute.

The same is true of the Segari case, 205 Federal 998, cited on page 19 of the brief. The tariffs on file with the Interstate Commerce Commission called for 47 cents per cwt., whereas the railroad company had contracted to transport the goods for 42 cents per cwt. The suit was to recover the difference. Manifestly, except for the Interstate Commerce Commission, the suit could not be maintained, and therefore logically be said to be based upon a federal law.

The case of Wells Fargo Against Cuneo, 241 Federal 726, cited on page 21 of the brief, does not, in the statement of facts, disclose whether there was a discrepancy between the contract rate and the published tariff or not, but it is plain from the opinion that in some measure there must have been involved a dispute or controversy as to the effect or construction of a federal law—for it is said:

"Where the complaint is based upon a contract between parties that only remotely depends upon federal law, the action should be brought in the state court."

Id. 727.

This remark describes the precise situation in our case. To recover on the contract sued upon, it is only necessary to refer to the public tariffs to ascertain the amount expressly stipulated to be paid. because those tariffs are referred to in the contract. Certainly the mere reference to the Interstate Commerce records for that purpose does not make the federal law the basis of the suit.

We submit also that there is much force in Judge Reed's suggestion in the Storm Lake case, *supra,* that nothing but the most clear and unequivocal language indicating an intent to vest the federal courts with jurisdiction over the myriad of suits for freight usually involving only trifling sums would warrant extension of the jurisdiction to such cases, and that "it seems incredible that Congress should have intended by the Judicial Code to confer jurisdiction upon the District Courts of the United States of causes of action such as that alleged in plaintiff's petition, and it is clear that it has not by apt words done so." (209 Fed. 903.)

Most cases of that character are properly cognizable in the justices' court, and there they should be disposed of.

II.

If the Court Has Jurisdiction, the Action Is Barred by the Statute of Limitations.

The action was brought within four years from the time the goods were shipped, but more than three years thereafter. We have pleaded in defense both subdi-

vision 1 of section 338, which bars an action upon a liability created by statute within three years, and subdivision 1 of section 339 of the California Code of Civil Procedure, which bars an action upon a contract, obligation or liability not founded upon a written instrument, within two years.

It seems to be conceded by appellant that the limitation statutes of the state in which action is brought control the time for the commencement of the suit, and this likewise is settled by the decisions of the federal courts.

Chicago Etc. Co. v. Ziebarth (C. C. A. 8th Cir), 245 Fed. 334, and cases therein cited.

The above case is also authority for the proposition that the liability for freight is one created by statute and barred by the three years' statute, but for the purposes of this case it makes no difference whether one or the other applies, for more than three years lapsed before the suit was commenced.

If, therefore, counsel's contention that the matter of freight charges is no longer the subject of the right of contract of the parties, but is governed and controlled exclusively by the act of Congress, it would seem that the liability must be treated as one created by statute, and therefore barred within three years. (See brief p. 16.)

But whether that be true or not, it is certain that the liability sought to be enforced in this case is not founded upon a written instrument. The only provision in the bill of lading on the subject of respon-

sibility for frieght charges is section 8, which reads as follows:

"The owner or consignee shall pay the freight and other lawful charges accruing on said property, and, if required, shall pay the same before delivery."

It is not alleged that defendant was the owner of the goods, and it appears on the face of the pleadings that defendant was not the consignee. It is not possible, therefore, we submit, to claim that there is any express written promise by defendant to pay the freight.

Moreover, it will be noted that the bill of lading is a contract between the Santa Fe and the shipper, and nowhere is there any promise to pay the New York Central Railroad Company anything. That obligation does not arise out of the bill of lading, but arises by implication of law, if at all.

Still further, it will be noticed that the written contract covers only the shipment of the goods from Cucamonga to Kansas City, and the obligation as to the freight from that point on to its ultimate destination grows out of the reconsignment or diversion orders alleged in the complaint, which gave rise to an obligation to pay the freight for that service through operation and implication of law, and not by virtue of any written contract.

From any conceivable standpoint, therefore, the obligation is not founded upon a written instrument, and therefore, if it is dependent upon the obligation implied by law, is barred within two years, and if dependent

upon the statute, is barred within three years, both of which limitations are pleaded.

The Yazoo Etc. R. Co. v. Zemurray case (238 Fed. 789), above cited, is likewise authority for this proposition. There the bill of lading also provided that the consignee should pay the freight, and the only obligation of the consignor was one implied by law. The court said:

"Since the shipment was regular in all respects, and the only thing complained of is the failure of parties responsible to pay the freight, we are also of the opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under the Louisiana law by three years as pleaded in the case."

238 Fed. 791.

It is well settled that even though this freight bill be construed as a contract made for the benefit of connecting carriers as well as the initial carrier, and even if the obligation to pay freight grew out of the contract in the sense that the bill of lading constitutes a link in the chain which gives rise to the obligation, nevertheless the obligation cannot be said to be founded upon a written instrument in the absence of an express promise by the defendant to pay the freight to the New York Central Railroad Company. Thus, in the case of

Washer v. Independent Etc. Co., 142 Cal. 703, it is said:

"Upon the principle of law long recognized and clearly established, that where one person for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, could maintain an action for the breach of such engagement; * * * that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the *law, operating upon the acts of the parties, creates a debt, establishes a privity and implies the promises and obligations on which the action is founded.*"

Again:

"But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. *In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing, for the non-performance of which the action is brought.*"

McCarthy v. Mt. Tecarte L. & W. Co.. 111 Cal. 328.

See also:

Scrivner v. Woodward, 139 Cal. 314;
Chipman v. Morrill, 20 Cal. 134;
Thomas v. Pacific Beach Co., 115 Cal. 136;
Patterson v. Doe, 130 Cal. 333;
Whalen v. Gordon (C. C. A. 8th Cir.), 95 Fed. 305, especially 313.

It is respectfully submitted that this court has no jurisdiction, and in any event, the case is barred by the statute of limitations, and the demurrer therefore was properly sustained and the action dismissed.

Respectfully submitted,
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